SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 126.

WILLIAM CARMICHAEL, E. KNAEBEL, ROBERT [illegible], GEORGE BEARDSLEY, JAMES HIGGS, THOMAS [illegible] MAN, WILLIAM FLANIGAN, JAMES STARR, [illegible] ADAM RUCH, MARTHA J. SHELTON, GEORGE [illegible] TON, T. M. BERTRAND, AND CHARLES DAVIS, PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

FRANCIS E. EBERLE.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED DECEMBER 6, 1909.

(17,209.)

(17,209.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 166.

WILLIAM CARMICHAEL, F. KILGORE, ROBERT TAYLOR, GEORGE BEARDSLEY, JAMES HOUSE, THOMAS COLEMAN, WILLIAM FLANIGAN, JAMES STARKWEATHER, ADAM HUGG, MARTHA J. SHELTON, GEORGE SHELTON, T. M. BERTRAND, AND CHARLES DAVIS, PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

FRANCIS X. EBERLE.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 6, 1900.

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1 In the Supreme Court of the Territory of New Mexico.

FRANCIS X. EBERLE, Plaintiff in Error,
vs.
WILLIAM CARMICHAEL ET AL., Defendants in Error.

Now comes the defendants in error in said cause, William Carmichael *et al.*, and files their præcipe for writ of error in said cause to the Supreme Court of the United States of America, and files herewith affidavit of amount in value.

WM. B. CHILDERS,
Attorney for the Plaintiff in Error in the Supreme Court of the United States.

Filed in my office this Aug. 10, 1897.

GEO. L. WYLLYS, *Clerk.*

2 TERRITORY OF NEW MEXICO,
County of Santa Fé.

In the Supreme Court of the Territory of New Mexico.

FRANCIS X. EBERLE, Plaintiff in Error,
vs.
WILLIAM CARMICHAEL ET AL., Defendants in Error.

William B. Childers, being duly sworn, deposes and says that he is the agent and attorney for the defendants in error in the supreme court of the Territory of New Mexico, being the plaintiffs in error in the Supreme Court of the United States, for the purpose of sueing out a writ of error to the Supreme Court of the United States, and further says that the value of the property in controversy in said cause exceeds in amount the sum of five thousand dollars, exclusive of costs and fees.

WILLIAM B. CHILDERS.

Subscribed and sworn to before me this 10th day of Aug't, A. D. 1897.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS,
Clerk of the Supreme Court of the Territory of New Mexico.

Filed in my office this Aug. 10, 1897.

GEO. L. WYLLYS, *Clerk.*

3 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the Territory of New Mexico, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the July term, 1896, thereof, between Francis X. Eberle, plaintiff in error, and William Carmichael *et al.*, defendants in error, a manifest error hath happened, it is said, to the great damage of the said William Carmichael *et al.*, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the United States Supreme Court on or before the 2nd Monday in October, A. D. 1897, to the end that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of Aug't, 1897.

Seal Supreme Court, Territory of New Mexico.

Witness my hand and the seal of the supreme court of the Territory of New Mexico this 10th day of Aug't, 1897.

GEO. L. WYLLYS, *Clerk.*

3½ The United States of America to Francis X. Eberle, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein William Carmichael, F. Kilgore, Robert Taylor, George Beardesley, James House, Thomas Coleman, William Flanigan, James Starkweather, Adam Hugg, Martha J. Shelton, George Shelton, T. M. Bertrand, and Charles Davis are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas Smith, chief justice of the su-

preme court of the Territory of New Mexico, this 10th day of Aug't, A. D. 1897.

THOMAS SMITH,
Chief Justice of the Supreme Court of the Territory of New Mexico.

Service made and accepted this Aug. 14th, 1897.

T. B. CATRON,
Attorney for Def't in Error.

[Endorsed:] No. —. Citation.

4 I, the undersigned, clerk of the supreme court of the Territory of New Mexico, make return to the foregoing writ of error by transmitting herewith to the Supreme Court of the United States a true copy of that portion of the transcript of the record filed in said supreme court of the Territory of New Mexico from the district court of the county of Socorro, in said Territory, as is deemed necessary by the plaintiffs in error herein for review by the Supreme Court of the United States of America, together with the assignments of error and all proceedings in the said cause, under my hand and seal of the said supreme court of the Territory of New Mexico.

GEO. L. WYLLYS, *Clerk.*

5 Be it remembered that heretofore, to wit, on July ninth, 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of the record lately pending in the fifth judicial district court for the county of Socorro, in said Territory, wherein Francis X. Eberle was plaintiff and William Carmichael *et al.* were defendants; which said transcript is in the words and figures following, to wit:

6 District Court, County of Socorro.

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

Be it remembered that upon the trial of the above-entitled cause at the May term, A. D. 1894, of the district court in and for the county of Socorro, the following pleadings, record, evidence and instructions were had and received in said cause with the objections, rulings of the court, and exceptions taken to the same as hereinafter set forth as follows to wit:

TERRITORY OF NEW MEXICO, }
County of Socorro. }

In the District Court for the Fifth Judicial District, Sitting within and for the County of Socorro, for the Trial of Causes Arising under the Laws of the Territory of New Mexico, at the December Term, 1893.

To the Hon. A. A. Freeman, associate justice of the supreme court of the Territory of New Mexico and judge of the fifth judicial district court thereof:

7 Plaintiff, Francis X. Eberle, a resident of Los Angeles, in the State of California, complains of William Carmichael, F. Kilgore, whose first name is to plaintiff unknown, Robert Taylor, George Beardsley, James House, Thomas Coleman, William Flanigan, Adam Hug, Martha J. Shelton, George Shelton, Thomas Starkweather, and T. N. Bertrand, whose first name is to the plaintiff unknown, all residents, as plaintiff is informed and believes, in the county of Socorro, and Charles Davis, a resident of Grant county, and says that on the tenth day of June, A. D. 1890, he was entitled to the possession of those three certain mining claims and lodes situate in the Cooney mining district in the county of Socorro, and Territory of New Mexico, known respectively as the "Clifton" mine or mining claim, the "Lexington" mine or mining claim and the "Andrew Jackson" mine or mining claim, said three mines or mining claims being situate in length adjacent the one to the other commencing at a monument on a large boulder on the south side of Silver creek and running almost due north four thousand five hundred feet more or less. The lead on which the said claims are located being commonly known and called the Queen lead; said claims being each six hundred feet wide and extending, as near as could be ascertained without an actual survey, three hundred (300) feet on each side from the center of said Queen lead; the said "Clifton" mine or mining claim having been located by Langford Johnson. The said "Lexington" mine or mining claim lo-
8 cated by John E. Eberle, and the said "Andrew Jackson" mine or mining claim having been located by plaintiff, that afterwards, to wit: on the same day and year at the county of Socorro aforesaid — entered upon the said premises and unlawfully with-eld from the plaintiff the possession thereof to his damage in the sum of fifty thousand dollars, plaintiff therefor- brings suit and prays judgment for the possession of said premises, together with his damages aforesaid to the amount of fifty thousand dollars and costs of suit.

T. B. CATRON,
Attorney for Plaintiff.

Which said declaration was endorsed as follows, to wit:

No. 2762. Socorro county. Francis X. Eberle *vs.* William Carmichael *et als.* Declaration in ejectment. Filed in my office October 26, 1893. J. W. Garner, clerk. T. B. Catron, attorney for plaintiff.

And thereafter, on the 7th day of May, A. D., 1894, there was filed in the office of the clerk of the district court aforesaid, defendant's plea, in the words and figures as follows, to wit:

In the District Court of the Fifth Judicial District of the Territory of New Mexico, Sitting in and for the County of Socorro, for the Trial of Causes Arising under the Laws of the Territory, at the May Term, A. D. 1894.

9 FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET AL. } No. 2762.

And the said defendant-, by *his* attorney H. L. Pickett, come and defend the force and injury when &c., and say that they are not guilty of the supposed trespass and ejectment above laid to their charge, or any part thereof, in manner and form, as the said plaintiff have above thereof complained against them; and of this said defendant- put themselves upon the country.

H. L. PICKETT,
Attorney for Chas. Davis.

And the said plaintiff doth the like.

T. B. CATRON,
W. S. WILLIAMS,
Attorneys for Plaintiff.

And thereafter, on the 8th day of May, A. D. 1894, there was filed in the office of the said clerk, defendants' plea, in the words and figures as follows, to wit:

In the District Court of the Fifth Judicial District of the Territory of New Mexico within and for the County of Socorro.

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

And the said defendants, by H. B. Hamilton and T. F. Conway, their attorneys, come and defend the force and injury, when,
10 etc., and say that they are not guilty of the said supposed trespasses and ejectments above laid to their charge, or any part thereof, in manner and form as the said plaintiff Francis X. Eberle hath above thereof complained against them; and of this, they, the said defendants put themselves upon the country, etc.

H. B. HAMILTON AND
T. F. CONWAY,
Attorneys for All of said Defendants Except Chas. Davis and F. Kilgore.

And said plaintiff doth likewise.

T. B. CATRON,
Attorney for Plaintiff.

And thereafter, at a regular term of the district court, of the fifth judicial district of the Territory of New Mexico, within and for the county of Socorro, in said district, begun and held on the first Monday of May, A. D. 1894, and on the twenty-sixth day of the said term, the same being the 5th day of June, A. D., 1894, the following among other proceedings were had and entered of record, to wit:

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

This cause coming on to be heard, comes the plaintiff in person, as well as by his attorneys, T. B. Catron and W. S. Williams, Esqs., and come the defendants in person and by their respective attorneys Messrs. H. L. Pickett, H. B. Hamilton and T. F. Conway,
11 and now both parties announcing themselves ready for trial, there comes the following jury, to wit:

Andrew Lucero, Juan Martinez, Leandro Barela, Serapio Penada, Jose Armijo y Lopez, Dolores Serna, Jose Baca, Benjamine Sanches, E. M. Kealer, Doniciano Padillo, Ramon Gonzales, Telesfero Gabaldon, twelve good and lawful men, taken from the body of the county of Socorro, duly selected, drawn, accepted and empaneled and sworn to well and truly try the issues joined in this cause pending, and a true verdict render according to the law and the evidence, and part of the evidence being submitted the jury are by the court placed in charge of sworn bailiffs of this court, until the incoming of court tomorrow morning.

And thereafter on the twenty-seventh day of the said term, the same being the 6th day of June, A. D. 1894, the following among other proceedings were had and entered of record, to wit:

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

Now again come the parties and come the jury, who being called are all found present, and the trial of this cause proceeds, and the evidence not being completed, the jury are by the court placed in charge of sworn bailiffs of this court, until the incoming of court tomorrow morning.

And thereafter, on the twenty-eighth day of the said term, the same being the 7th day of June, A. D. 1894, the following proceedings were had and entered of record, to wit:

12 FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

Now again come the parties and come the jury, who being called are all found present, and the trial of this cause proceeds, and the evidence not being completed, the jury are by the court placed in

rge of sworn bailiffs of this court until the incoming of court orrow morning.

nd thereafter on the twenty-ninth day of the said term, the e being the 8th day of June, A. D. 1894, the following among r proceedings were had and entered of record, to wit:

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

ow again come the parties and come the jury, who being called ll found present, and the trial of this cause proceeds, and the ence not being completed, the jury are by the court placed in rge of sworn bailiffs of this court, until the incoming of court orrow morning.

nd thereafter, on the thirtieth day of the said term the same g the 9th day of June, A. D. 1894, the following among other eedings were had and entered of record, to wit:

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

Now again come the parties and come the jury, who being called are all found present, and the trial of this cause pro- s, and the evidence not being completed the jury are by the t placed in charge of sworn bailiffs of this court, until the in- ng of court Monday morning.

nd thereafter, on the thirty-first day of the said term the same g the 11th day of June, A. D. 1894, the following among other eedings were had and entered of record, to wit:

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

w again come the parties and come the jury, who being called ll found present, and the trial of this cause proceeds, and the ence not being completed, the jury are by the court placed in ge of sworn officers of this court until the incoming of court rrow morning.

nd thereafter, on the thirty-second day of the said term, the being the 12th day of June, A. D. 1894, the following among proceedings were had and entered of record, to wit:

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

w again come the parties and come the jury, who being called ll found present, and the trial of this cause proceeds, and the

evidence not being completed, the jury are by the court
13 placed in charge of sworn bailiffs of this court until the incoming of court tomorrow morning.

And thereafter, on the thirty-third day of the said term, the same being the 13th day of June, A. D. 1894, the following among other proceedings were had and entered of record, to wit:

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

Now again come the parties and come the jury, who being called are all found present and the trial of this cause proceeds, and the evidence not being completed, the jury are by the court placed in charge of sworn bailiffs of this court, until the incoming of court tomorrow morning.

And thereafter, on the thirty-fourth day of the said term, the same being the 14th day of June, A. D. 1894, the following among other proceedings were had and entered of record, to wit:

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

Now again come the parties and come the jury who being called are all found present and the trial of this cause proceeds, and the evidence not being completed, the jury are by the court placed in charge of sworn bailiffs of this court until the incoming of court tomorrow morning.

14 And thereafter, on the thirty-fifth day of the said term, the same being the 15th day of June, A. D., 1894, the following among other proceedings were had and entered of record, to wit:

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } No. 2762.

Now again come the parties and come the jury, who being called are all found present, and the trial of this cause proceeds, and the evidence on the part of the plaintiff being submitted, the jury by instructions of the court (to which said instructions of the court plaintiff by his attorneys then and there duly excepted) return the following verdict:

"We, the jury, by the direction of the court, find the defendants guilty as to the claim set forth and described in plaintiff's declaration by and under the name of the 'Clifton claim' as follows:

"'Located fifteen hundred feet on the Queen lode or ledge on deposite situated in Silver creek, two miles east of Mineral creek, three miles west of White Water, in Socorro county, New Mexico, and described as follows:

Commencing at a monument of stone, where location notice is
ut up, and running three hundred feet westerly to a monument of
tone; from thence fifteen hundred feet in a southerly direction to
monument of stone; from thence six hundred feet easterly to a
monument of stone; from thence fifteen hundred feet north-
5 erly to a monument of stone; from thence three hundred —
westerly to the place of beginning.' Being the claim located
lay 6th, 1879, in the name of Langford Johnson, certificate of loca-
ion of which is recorded in Book F, at page 572, of mining records
f Socorro county, New Mexico.

And by the direction of the court we find the defendants not
uilty as to all that portion of the ground set out and described in
laintiff's declaration known and designated as the Lexington
aim, fully described and set forth in the location notice of said
aim, duly made on the 3rd day of October, 1881, and recorded in
ie recorder's office of Socorro county on the 3rd day of December,
882, at 11 o'clock a. m., and recorded in Book A, at page 408, fully
id particularly described as follows:

"'Being fifteen hundred feet in length on the Queen lode by three
undred feet on each side of said vein, located in the Cooney mining
istrict, in the county of Socorro, Territory of New Mexico, and
lly described as follows, to wit:

Commencing at a monument where the notice is posted and run-
ing in a northerly direction fifteen hundred feet, corners all
arked as required by law, situated about fifteen hundred feet
orth of Silver creek, and being bounded on the south by the Clif-
n mine, and on the north by the Andrew Jackson mine, said
aim being fully described in said records of Socorro county.'

And also by the direction of the court we find the defend-
3 ants not guilty as to the Andrew Jackson claim, set out in
the plaintiff's declaration and described as follows:

Said claim having been located on October 3rd, 1881, and
escribed in the location notice of said claim, duly filed for record
Book A, at page 409, of the public records of said county of
ocorro, said claim being fifteen hundred feet in length, three hun-
red feet in width on each side of said lode, the same being located
n the Queen lode in the Cooney mining district, county of Socorro,
erritory of New Mexico, and fully described as follows:

Commencing at the north end center monument of the Lexington
ine and running 1,500 feet in a northerly direction to a monument
stone, with all corners marked by substantial monuments of
one, according to law; and is bounded on the south by the Lex-
gton mine, about one-half mile south of Mineral creek, said claim
ing described in said notice and recorded as aforesaid."

BENJ. SANCHES, *Foreman.*

And now comes the plaintiff by his attorney, after the verdict
d before judgment, and gives notice that he will move the court
r a new trial of this cause.

And now on this day comes Adam Hug, one of the defendants
rein, in person and by his attorney, and after verdict and before

judgment is rendered in said cause, and agrees and consents that a judgment of guilty may be entered against him in this cause
17 for whatever interest he may have in and to the Andrew Jackson mine, mentioned and described in plaintiff's declaration, being one-sixth thereof, and for whatever interest he may have in either of the other mines or mining claims in said declaration mentioned; and that judgment may be entered herein by the court, notwithstanding the verdict of not guilty herein.

ADAM HUG,
By H. B. HAMILTON AND
T. F. CONWAY,
His Attorneys.

And thereafter, on the 16th day of June, A. D. 1894, there was filed in the office of the said district clerk, a motion for a new trial, in the words and figures as follows, to wit:

In the District Court, County of Socorro, Territory of New Mexico.

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } Ejectment.

Now comes the plaintiff in the above-entitled cause and moves the court to set aside the verdict in the above-entitled cause and grant a new trial therein for the following reasons:

1st. Said verdict is contrary to the law, in so far as it finds the defendants not guilty as to the Lexington and Andrew Jackson mines and mining claims.

2nd. Said verdict is contrary to the evidence, in so far as it finds the defendants not guilty as to the Lexington and Andrew Jackson mines and mining claims.

18 3rd. Said verdict, in so far as it affects the Lexington and Andrew Jackson mines and mining claims, was given for the defendants when it should have been given for the plaintiff.

4th. Because the court upon the trial of said cause admitted improper evidence on cross-examination of the witnesses.

5th. Because the court upon the trial of said cause excluded proper and competent evidence from the jury, which was offered by the plaintiff.

6th. Because the court gave improper and wrong instructions to the jury in regard to the Lexington and Andrew Jackson mines and mining claims.

7th. Because the court peremptorily withdrew said cause from the consideration of the jury and directed a verdict in favor of the defendants in respect to the Lexington and Andrew Jackson mines and mining claims.

8th. Because there was ample and sufficient evidence in said cause to go to the jury in respect to the Lexington and Andrew Jackson mines and mining claims and have the consideration of the jury thereon.

9th. Because the court should have directed a verdict in favor of the plaintiff upon the evidence, as to all of the claims involved in the suit, instead of limiting its direction in favor of the plaintiff to the Clifton mine and mining claims.

10th. Because upon the records and proceedings in said
19 cause there are divers other errors, irregularities and improper actions apparent which operated to the prejudice of the plaintiff and to the benefit of the defendants, for which the said court should grant a new trial, and particularly as to the said Lexington and Andrew Jackson mines and mining claims.

T. B. CATRON AND
W. S. WILLIAMS,
Attorneys for Plaintiff.

And thereupon, on the same day, the same being the 16th day of June, A. D., 1894, there was filed in the office of the clerk of the said district court, a motion in arrest of judgment, in the words and figures as follows:

In the District Court, County of Socorro, Territory of New Mexico.

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET ALS. } Ejectment.

Now comes said plaintiff and moves the court for arrest of judgment in the above-entitled cause, as to said Lexington and Andrew Jackson mines because:

It is apparent upon the record and pleadings in said cause that the said plaintiff is entitled to the possession of said mines and said defendants are not entitled to the possession.

Because the court erred in admitting improper evidence to the jury on behalf of the defendants against the objections of the plaintiff.

20 Because the court erred in excluding proper evidence offered by the plaintiff tending to prove his said cause.

Because the court erred in directing a verdict for the defendants as to the Lexington and Andrew Jackson mines and in not directing it for the plaintiff as to the said mines.

Because from the record and pleadings and proceedings in said cause it is apparent and evident that the verdict in said cause should have been for the plaintiff as to the Lexington and Andrew Jackson mines, and not for the defendant-; and because of divers and sundry errors, irregularities and insufficiencies apparent upon the record proceedings and pleadings in said cause, committed against said plaintiff and in favor of the said defendants upon the trial of said cause.

T. B. CATRON,
W. S. WILLIAMS,
Attorneys for Plaintiff.

And thereupon on the same day, the same being the 16th day of June, A. D. 1894, the following among other proceedings were had and entered of record, to wit:

FRANCIS X. EBERLE
vs.
WILLIAM CARMICHAEL ET AL'S. } No. 2762.

This cause coming on to be heard on plaintiff's motion to set aside the verdict of the jury heretofore returned in this cause,
21 and for a new trial of this cause, and the arguments of counsel being heard and the court being fully advised in the premises, said motion is by the court overruled and denied, to which said judgment and ruling of the court, plaintiff by his attorneys then and there duly excepts.

And now comes the plaintiff by his attorneys and moves the court to arrest the judgment of the court herein, which motion is heard and by the court overruled and denied, to which judgment and ruling of the court plaintiff by his attorneys then and there duly excepts.

This cause coming on again for further hearing and trial, and both parties being present, and the plaintiff having concluded his evidence and rested his case, the said defendants move the court to direct a verdict in favor of the defendants as to the Lexington and Andrew Jackson mines and mining claims, mentioned and described in the said declaration, and the court after hearing the arguments of counsel for the plaintiff and defendants, sustains said motion, and thereupon the jury, by direction of the court, rendered a verdict in said words and figures as follows, to wit:

We, the jury by direction of the court find the defendants guilty as to the claim set forth and described in plaintiff's declaration by and under the name of the Clifton mine as follows:

"Located fifteen hundred feet on the Queen lode or ledge of de-
posite situated in Silver creek, two miles east of Mineral
22 creek, three miles west of White Water, in Socorro county, New Mexico, and described as follows:

Commencing at a monument of stone, where location notice is put up, and running three hundred feet westerly to a monument of stone; from thence fifteen hundred feet in a southerly direction to a monument of stone; from thence six hundred feet easterly to a monument of stone; from thence fifteen hundred feet northerly to a monument of stone; from thence three hundred feet westerly to place of beginning, being the claim located May 6th, 1879, in the name of Langford Johnson, certificate of location of which is recorded in Book F, at page 572, on mining record of Socorro county, New Mexico."

And by the direction of the court we find the defendants not guilty as to all that portion of the ground set out and described in plaintiff's declaration, known and designated as the Lexington claim, fully described and set forth in the location notice of said claim, duly made on the 3rd day of October, 1881, and recorded in

the recorder's office of Socorro county, on the 3rd day of December, 1882, at 11 o'clock a. m., and recorded in Book A, at page 408, fully and particularly described as follows:

"Being fifteen hundred feet in length on the Queen lode by three hundred feet on each side of said vein, located in the Cooney mining district, in the county of Socorro, Territory of New Mexico, and fully described as follows, to wit:

23 Commencing at a monument where the notice is posted and running in a northerly direction fifteen hundred feet, corners all marked as required by law, situated about fifteen hundred feet north of Silver creek, and being bounded on the south by the Clifton mine, and on the north by the Andrew Jackson mine, said claim being fully described in said records of Socorro county."

And also by the direction of the court we find the defendants not guilty as to the Andrew Jackson claim, set out in the plaintiff's declaration and described as follows:

Said claim having been located on October 3rd, 1881, and described in the location notice of said claim, duly filed for record in Book A, at page 409, of the public records of said county of Socorro, said claim being fifteen hundred feet in length, three hundred feet in width on each side of said lode, the same being located on the Queen lode in the Cooney mining district, county of Socorro, Territory of New Mexico and fully described as follows:

Commencing at the north end center monument of the Lexington mine and running 1,500 feet in a northerly direction to a monument of stone, with all corners marked by substantial monuments of stone, according to law; and is bounded on the south by the Lexington mine, about one-half mile south of Mineral creek, said claim being described in said notice and recorded as aforesaid.

BENJ. SANCHES, *Foreman.*

24 And after the said verdict and before judgment the said defendant Adam Hug, files his consent in writing that judgment may be rendered against him for whatever interest he has or had in and to the said Andrew Jackson mine or mining claim mentioned and described in said declaration, the same being one-sixth of the said Andrew Jackson mine, or for whatever interest he may have in and to either of the said mines in said declaration mentioned, which said consent is in words and figures as follows, to wit:

Now on this day comes Adam Hug, one of the defendants herein, in person and by his attorney and after verdict and before judgment is rendered in this cause, and agrees and consents that a judgment of guilty may be entered against him in this cause for whatever interest he may have in and to the Andrew Jackson mine, mentioned and described in plaintiff's declaration, being one-sixth thereof, and for whatever interest he may have in either of the other mines or mining claims in said declaration mentioned; and that

said judgment may be entered herein by the court, notwithstanding the verdict of not guilty herein.

(Signed) ADAM HUGG,
By H. B. HAMILTON AND
T. F. CONWAY,
His Attorneys.

It is therefore considered, ordered and adjudged by the court that the plaintiff do have and recover the possession of the said
25 mining claim known as the Clifton mine and mining claim, particularly described in the verdict aforesaid, and that he have and recover the possession of an undivided one-sixth interest in the Andrew Jackson mining claim, mentioned and described in the said declaration, and that as to the said Lexington mining claim, and as to the remaining five-sixths of the said Andrew Jackson mining claim, mentioned and described in the said declaration and verdict of said jury, the defendants go hence without day, and that the said plaintiff recover his costs in this cause by him laid out and expended and taxes therein, and that he have execution therefor.

26 And afterwards, to wit, on the twenty-ninth day of July, A. D. 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors; which said assignment of errors are in the words and figures *as* following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1895.

FRANCIS X. EBERLE *vs.* WILLIAM CARMICHAEL ET AL. } Ejectment. Error to Socorro County.

Assignment of Errors.

Now comes the plaintiff in the above-entitled cause and says there is manifest error in the record and proceedings in the above-entitled cause in this, that the court erred:

1. In instructing the jury verbally and not in writing.
2. In directing a verdict for defendants and not for the plaintiff.
3. In not submitting the cause to the determination of the jury
4. In giving its directions and instructions to the jury, the same not being supported by the facts.
5. In ignoring the undoubted and unquestioned facts proven in the case.
6. In giving any judgment for the defendants.
7. In not giving judgment for plaintiff for the Lexington mine
8. In not giving judgment for the plaintiff for the whole of the Andrew Jackson mine.

9. In refusing to permit plaintiff to proceed with the examination of the witness Johnson (folios 2233, '4, pp. 1747, '8).

10. In allowing improper cross-examination of plaintiff's witnesses.

11. In allowing defendants, on cross-examination of plaintiff's witnesses, to elicit facts which were not involved in the matters brought out in chief or germain to the same, and which were not proper or competent evidence.

12. In excluding proper and competent evidence offered by plaintiff on the trial of said cause.

13. In many other respects in its rulings, decisions, and judgment in various parts of the record and proceedings, and in many other respects, as will be seen by reference to said record and proceedings.

For which errors, so manifestly appearing on the said record, the plaintiff prays that said judgment may be reversed, annulled, set aside, and held for naught so far as it is in favor of said defendants, and that a new trial may be awarded.

T. B. CATRON,
Attorney for Plaintiff in Error.

27 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, N. M., the seat of government of said Territory, on the last Monday of July, 1895, the same being Monday, July 29th, 1895, and on the eighteenth day of said regular term of said supreme court, the following, among other, proceedings were had, to wit:

FRANCIS X. EBERLE, Plaintiff in Error, *vs.* WILLIAM CARMICHAEL ET AL., Defendant- in Error.	No. 606.	Error to Socorro County.

This cause coming on for hearing upon the transcript of record, assignment of errors, and briefs of counsel on filed, is partly argued by T. B. Catron, Esq., for said plaintiffs in error, and H. L. Pickett, Esq., for defendants in error.

And afterwards, to wit, on the nineteenth day of said regular term of said supreme court, the same being Monday, August 19th, 1895, the following, among other, proceedings were had, to wit:

FRANCIS X. EBERLE, Plaintiff in Error, *vs.* WILLIAM CARMICHAEL ET AL., Defendants in Error.	No. 606.	Error to Socorro County.

This cause coming on for further argument is argued by W. B. Childers, Esq., for said defendants in error, and T. B. Catron, Esq., for plaintiff in error, and submitted to the court, and the court, not

being sufficiently advised in the premises, takes the same under advisement.

28 And afterwards, to wit, on the thirty-sixth day of said regular term of said supreme court, the same being Wednesday, the sixteenth day of October, 1895, the following, among other, proceedings were had, to wit:

FRANCIS X. EBERLE, Plaintiff in Error,
vs.
WILLIAM CARMICHAEL ET AL., Defendants in Error.
} No. 606. Error to Socorro County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision, by Associate Justice Collier, Chief Justice Smith concurring, Associate Justice Laughlin dissenting, reversing the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment in this cause of the district court in and for the county of Socorro, whence this cause came into this court, be, and the same hereby is, reversed, and that this cause be, and the same hereby is, remanded to said district court, with directions to grant a new trial thereof. It is further considered and adjudged by the court that the said plaintiff in error do have and recover of said defendants in error his costs in this behalf expended, as well in the court below as in this court expended, to be taxed, and that execution issue therefor.

29 And afterwards, to wit, on the seventeenth day of December, A. D. 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a motion for rehearing; which said motion is in the words and figures *as* following, to wit:

30 In the Supreme Court of the Territory of New Mexico, July Term, 1895.

FRANCIS X. EBERLE, Plaintiff in Error,
vs.
WILLIAM CARMICHAEL ET AL., Defendants in Error.

Motion for Rehearing.

The defendants in error, by their attorneys, move the court for a rehearing in the above cause for the following reasons:

1st. There was not sufficient evidence in the court below to entitle the plaintiff in error to have had said cause submitted to the jury; hence the judgment of the lower court should have been affirmed.

2nd. As to whether the grantors of the plaintiff in error ever held

such property in common was a question of law to be determined by the court and not a question for a jury to determine.

3rd. As to the verbal contract that was shown to have existed between the plaintiff in error'- grantors in reference to said property was a question of law to be determined by the court as to its effects on third parties, and not a question of fact to go to the jury.

4th. The deeds from plaintiff in error'- grantors to said property were without a seal and absolutely void and conveyed no title or interest in said property to the plaintiff in error, and this fact alone was *d*ufficient to have warranted the court in taking the case from the jury.

5th. Owing to the magnitude of the case, the amount of property involved, and the important questions to be determined, the defendants in error are desirous of having the case reheard before a full bench, and particularly so as there was a dissenting opinion on the hearing.

The authorities relied upon in support of this motion are hereto attached.

Respectfully submitted.

H. L. PICKETT.

Authorities.

31 When evidence is insufficient to entitle a party to go to the jury:

See 117 U. S. Reports, page 415.
113 U. S. Reports, page 241.
109 U. S. Reports, page 478.

Holding in common:

See 111 U. S. Reports, page 350.
109 U. S. Reports, page 440.
1 Idaho Reports, page 485.
Supreme Court Reports, page 192.

Who are tenants in common:

See 2 Nevada Reports, page 9.
Chitty *vs.* Blackstone, vol. 1, page 154, section 4.
Bouvier's Law Dictionary, vol. 2, page 712.
4th Kent, page 367, section 3.
1st Idaho, page 486–489.

As to the verbal contract: It could not effect the rights of third parties, because the statute of frauds is in force in this Territory. See Browning *vs.* Browning, 3 New Mexico Reports, page 371. See also Brown on the Statute of Frauds, sec. 231; Knowlton's Anson on Contracts, page 66; 40 Pacific Reporter, page 1076. Such a contract could only have been enforced as between the parties, and that only in a court of equity.

Mining claims have been declared real estate by special act of the legislature, and hence the statute of frauds is applicable.

The deeds to the plaintiff in error, to this property, were without seal and conveyed no interest.

See sections 2742, 2771, 2772, Compiled Laws of New Mexico.
Excelsior Mfg. Co. *vs.* Wheelock, 28 Pacific Reporter, page 772.
5 American and English Encyclopædia of Law, page 441.

TERRITORY OF NEW MEXICO, } *ss:*
County of Grant, }

H. L. Pickett, one of the attorneys for the defendants in error in the above cause, certifies that the above motion for a rehearing is, in his opinion, well founded in point of law.

H. L. PICKETT.

32 And afterwards, to wit, on the forty-seventh day of said regular term of said supreme court, the same being Wednesday, February 5th, 1896, the following, among other, proceedings were had, to wit:

It is ordered that this court do now adjourn until court in course. All causes not otherwise disposed of are continued.

33 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the last Monday of July, A. D. 1896, the same being Monday, July 27th, 1896, and on the fourteenth day of said term, the same being Tuesday, August 11th, 1896, the following, among other, proceedings were had, to wit:

FRANCIS X. EBERLE, Plaintiff in Error, } No. 606. Error to Socorro
vs. } County.
WILLIAM CARMICHAEL ET AL. }

This cause coming on for hearing upon the motion of said defendants in error, heretofore filed herein, for a rehearing of said cause, the same is argued by H. L. Pickett, Esq., attorney for said defendants in error, and by T. B. Catron, Esq., attorney for said plaintiff in error, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, at said regular term of said supreme court, and on the forty-fourth day of said regular term, the same being Friday, December 18th, 1896, the following, among other proceedings were had, to wit:

FRANCIS X. EBERLE, Plaintiff in Error, }
vs. } No. 606. Error to Socorro
WILLIAM CARMICHAEL ET AL., Defendants in Error. } County.

This cause having been argued by counsel and submitted to and taken under advisement by the court on a former day of the pres

ent term, upon the motion of the said defendants in error for a rehearing of said cause granted herein at a former term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Collier, Chief Justice Smith concurring, Associate Justices Laughlin and Bantz dissenting, reversing the judgment of the court below, and remanding said cause for a new trial, for reasons stated in the opinion of the court on file herein.

34 It is therefore considered and adjudged by the court that the judgment of the district court in this cause in and for the county of Socorro, whence this cause came into this court, be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to said district court, with directions to grant a new trial thereof. It is further considered and adjudged that said plaintiff in error do have and recover of said defendants in error his costs in this behalf expended, as well in the court below as in this court expended, to be taxed, and that execution issue therefor.

And afterward, to wit, there was filed on Feb. 1st, 1897, in the office of the clerk of said supreme court of said Territory, a motion; which said motion is in the words and figures as following, to wit:

In the Supreme Court of New Mexico.

F. X. EBERLE *vs.* CARMICHAEL. } No. 606.

Now come the defendants in error in the above-entitled cause and move the court to set aside the entry heretofore made in said cause on the 11th day of August, 1896, as the same appears upon page 388 of the records of said court in Record B page 388, and to enter *nunc pro tunc* in place of said entry an order granting to the appellees in said cause a rehearing, and also that the court set aside the judgment of reversal in said cause on the 18th day of December, 1896, as the same appears upon page 464 of Record B of the minutes and records of said court, and enter in lieu thereof an order affirming the judgment of the court below, and for grounds of said motion the said appellees show to the court that a rehearing was granted in said cause and said cause reargued and taken under advisement by the court and afterwards decided by a divided court, two of the members sitting in said cause being in favor of reversal and two in favor of affirmation, which entry in legal effect results in the affirmation of the judgment of the court below.

W. B. CHILDERS,
H. L. PICKETT,
T. F. CONWAY,
Att'ys for Def'ts in Error.

35 (Endorsements:) 606. Supreme court. Eberle *vs.* Carmichael. Motion to amend record and make entry *nunc pro tunc.* Filed in my office this Feb. 1, 1897. Geo. L. Wyllys, clerk.

And afterwards, to wit, on the forty-seventh day of said regular term of said supreme court, the same being Monday, March 1st, 1897, the following, among other, proceedings were had, to wit:

FRANCIS X. EBERLE, Plaintiff in Error, *vs.* WILLIAM CARMICHAEL ET AL, Defendants in Error.	No. 606. Error to District Court, Socorro County.

This cause having been submitted on motion to amend the record and make an entry *nunc pro tunc* granting the defendants in error a rehearing on a former day of this term, the court announces its decision by Chief Justice Smith, the associate justices concurring, denying said motion. It is therefore considered and adjudged by the court that the motion to amend the record and to make an entry *nunc pro tunc* be, and the same hereby is, denied.

36 And heretofore, to wit, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, on the sixteenth day of October, A. D. 1895, an opinion of the court; which said opinion is in the words and figures as follow*ing*, to wit:

37 In the Supreme Court of the Territory of New Mexico.

FRANCIS X. EBERLE, Plaintiff in Error, *vs.* WILLIAM CARMICHAEL ET AL., Defendants in Error.	No. 606. Ejectment. Error to Socorro County.

Statement of Facts.

This was an action of ejectment brought on October 26th, 1893, by plaintiff against defendants for the possession of three mines situate in the Cooney mining district, in the county of Socorro, New Mexico, called the Clifton, Lexington, and Andrew Jackson.

Defendants plead not guilty only, put in no special plea, and the court directed verbally a verdict for plaintiff for the Clifton mine and a verdict for the defendants for the Lexington and Andrew Jackson mines. On that verdict judgment was entered for plaintiff for the possession of the Clifton mine and against the plaintiff as to the Lexington mine, as to five-sixths of the Andrew Jackson mine, and in favor of plaintiff for one-sixth of the Andrew Jackson mine, which last was entered on a stipulation of consent of the defendant Adam Hugg. The plaintiff on the entering of such judgment made motions for new trial and in arrest of judgment, both of which were overruled, and has brought the case into this court by writ of error.

The testimony tended to show that an oral agreement was made in the year 1878 or 1879 between John E. Eberle for himself and as agent of F. X. Eberle and Langford Johnson; that said John E.

Eberle and Johnson would prospect for and locate mines in Arizona nd New Mexico, and that all mines located in the name of either hould be owned in common by the three, F. X. Eberle to furnish he necessary means to develop and hold said mines under the nining laws of the United States.

Subsequent to this agreement the Clifton mine was located 8 on May 26th, 1879, in the name of Johnson, and on October 3rd, 1881, the Lexington mine in the name of John E. Eberle, nd the Andrew Jackson mine in the name of the plaintiff, F. X. Eberle. The location notice of the Lexington was recorded in May, 879, and that of the other two in December, 1881. The three nining claims lie adjacent—that is to say, the Lexington abuts the Clifton on the north and the Andrew Jackson abuts the Lexington n the north, making a continuous vein or lode extending nearly orty-five hundred (4,500) feet in length for the three.

On April 5th, 1887, Johnson executed an instrument purporting o convey to John E. Eberle his interest in said three claims, reserving ne-eighth of the proceeds of the sale thereof; which instrument was led in the county recorder's office on April 20th, 1887.

John E. Eberle conveyed all his interest in the three claims to . X. Eberle, the plaintiff, on December 26th, 1889, acknowledgment eing made before a notary public on January 4th, 1890, and the nstrument recorded in the county recorder's office on January 9th, 890.

There is testimony tending to show that John E. Eberle had rior to this time conveyed the same interest to F. X. Eberle, but ne instrument of conveyance was lost without ever having been ecorded.

The location notice as recorded is as follows:

Notice of Location.

ERRITORY OF NEW MEXICO, }
County of Socorro, } ss:

Know all men by these presents that John E. Eberle, the under- gned, citizen of the United States, has this 3rd day of October, 1881, aimed by right of discovery and location, and does hereby claim virtue of such right, 1,500 feet, linear and horizontal measure- ent, in length and 300 feet in width on each side of the middle of e vein on this lode, vein, ledge, or deposit along the course of the me, with all its dips, veriations, and angles, together with the amount of surface allowed by law. This said lode, vein, ledge, or deposit hereby located and claimed, as aforesaid, is situated in Cooney mining district, Socorro county, Territory New Mexico, and is bounded and described as follows, to wit: Commencing at monument where notice is posted and running northerly direction 1,500 feet, corners all marked as required by w, situated about 1,500 feet north of Silver creek, bounded on uth by Clifton mine, on the north by the Andrew Jackson mine

The same vein, ledge, or deposit so located is the Lexington mine, discovered October 3rd, 1881; located October 3rd, 1881.

JOHN E. EBERLE, *Locator.*

Witnesses:
L. JOHNSON.
J. W. FOSTER.

Lexington mine, John E. Eberle, locator.

The Andrew Jackson location notice is in the same language, with description as follows: "Commencing at the north end center monument of the Lexington mine and running 1,500 feet in a northerly direction to a monument of stone, with all corners marked by substantial monuments of stone according to law, and is bounded on the south by Lexington mine, about one-half mile south of Mineral creek."

The testimony tended to show that on the Clifton mine, located in 1879, annual work was done on the lode down to and including the year 1882, and upon each of the other mines for the years 1881 and 1882, and that subsequent to 1882 work was done every year upon the Clifton in a tunnel up to the time of commencing this suit. There was also testimony that down to the time that Johnson conveyed his interest, reserving one-eighth in the three mines, the work was done by the means furnished by F. X. Eberle, and the joint labors of the other two and their employers, and that in February, 1889, an employé of John Eberle sank a shaft on the Lexington to a depth of about twelve feet, at an expense of $10.00 per foot. There is some evidence tending to show that the purpose of the tunnel upon the Clifton mine was for the developing and holding of it and the other three claims, and that such work did so tend and would in all likelihood result in such development if said tunnel were sufficiently extended.

The testimony shows that shafts were sunk on the lead on each of the three mines at the time of location. Also there was testimony tending to show that the defendants were notified prior to their going upon the mines that the tunnel on the Clifton was for the purpose of developing the three mines. There was also testimony showing a purchase by plaintiff from Adam Hugg, one of the defendants, of his interest in the three mines and a contract accompanying the purchase setting forth that the same was made by plaintiff while expressly disclaiming any acknowledgment of interest in Hugg, but for the purpose of removing a cloud upon plaintiff's title. It was shown, also, that Hugg located in 1888 the Consolidated mine so as to conflict with the Andrew Jackson location.

Opinion of the Court.

COLLIER, *A. J.:*

We deem it unnecessary to comment on the evidence submitted by the plaintiff as to there being an oral agreement between him and John E. Eberle and Langford Johnson for a location and development of mines for the benefit and co-ownership of the three,

of work being prosecuted in furtherance of said agreement, and of a tunnel being run on the Clifton mine intended and reasonably tending to develop the three mines. The testimony on these points, being uncontradicted, was sufficient to carry plaintiff's case
41 to the jury if in law he had a *locus standi*, and as to this we will proceed to discuss.

It seemed to appear to the court below that a case had been made out in plaintiff's favor so completely as to the Clifton mine that the jury were instructed that as to it they should return a verdict in plaintiff's favor.

It is to be observed that if plaintiff was entitled to recover as — the Clifton mine, it was not because of the original location being in his name, for as a matter of fact it was located in the name of Langford Johnson in 1879, and by subsequent conveyances the title came into plaintiff, it being first conveyed to John E. Eberle and by him to plaintiff. It also seems to be the theory of the court below that it was beyond dispute that the tunnel upon the Clifton mine, whatever might be said about its tending to develop the Lexington and Andrew Jackson mines, was at least annual work, under the law, on the Clifton sufficient to render impeachable plaintiff's possessory right.

We have said that, in our opinion, the tunnel-work on the Clifton should be considered as work done for and having a tendency towards development of it and the other two mines, and that the evidence in that regard was sufficient to go to the jury. It is well settled that when several adjoining claims are held in common, work for the benefit of all done upon any one of them in a given year to the amount equal to that required to be done upon all meets the requirements of the mining laws of the United States.

Smelting Co. *vs.* Kemp, 104 U. S., 636.
Jackson *vs.* Roby, 109 U. S., 440.
Chambers *vs.* Harrington, 111 U. S., 350.

Let us inquire then, what is plaintiff's status as to the other mines. We will consider first the case of the Lexington mine. This mine was located in 1881, in the individual name of John E. Eberle, who conveyed to the plaintiff, by deed duly recorded, on January 9th, 1890.

The status of that mine, then, seems to be that if the parol
42 agreement respecting the location and working of mines was not effectual to vest an interest in F. X. Eberle and Johnson, then John E. Eberle has the entire interest, if any at all, by virtue of the location in 1881, and if said agreement was so effectual he was vested with a two-thirds interest subsequent to the Johnson conveyance in 1887, and in either event plaintiff acquired by the conveyance of 1890 the entire interest in the Lexington mine, the question of that interest being preserved being hereafter considered. It also appears that inasmuch as the Lexington mine abuts on the Clifton, the Clifton tunnel could be deemed, if it and the Clifton were held in common, as tending to develop the Lexington, even if

the Andrew Jackson, which abuts on the Lexington, should be considered as the property of strangers.

There is some testimony to the effect that in the spring of 1889 one James House located ground that conflicted with the Lexington location, but it is of so slight and so vague a character that it should not be considered as militating against plaintiff's right to go to the jury if, as a matter of fact, plaintiff acquired by instruments of conveyance the prior interest or interests in that mine. If plaintiff had acquired the entire interest in both the Clifton and Lexington mines, then the work subsequent to January, 1890, done on the tunnel, having, as we have said the testimony tends to show, the purpose and tendency to develop both, it was work for the two mines held in common, if they were so held.

It is admitted in the brief for defendants in error that this work was done continuously every year on the Clifton tunnel. It appears, therefore, that the court erred, so far at least as the Lexington mine is concerned, in directing a verdict for the defendants if these mines were held in common.

If the House location was in fact made, and made prior to January, 1890, what we hereafter say in this opinion in reference
43 to the Adam Hug location of the Consolidated mine, so far as the Andrew Jackson is concerned, will apply to the House location as conflicting with the Lexington mine, as well as what we say about the mines being held in common.

The Andrew Jackson mine occupies a somewhat different status from that of the Lexington, in that it appears by undisputed testimony that in 1888 the "Consolidated mine" was located so as to conflict with the Andrew Jackson. It also seems to be true beyond question that a valid location could have been initiated at the time by Adam Hug, unless the Andrew Jackson, Lexington, and Clifton mines were held in common, first by the two Eberles and Johnson and subsequently by the two Eberles, and the tunnel-work was done and had the purpose and tendency to develop the three mines. We being satisfied, as already remarked, that such tunnel-work was done and had such purpose and tendency, or that it sufficiently so appears for the purposes we here have, we are left to consider whether or not the three mines were held in common.

The fact that the location was in the name of F. X. Eberle alone cannot in this inquiry be considered, because it conclusively appears that the annual assessment-work upon this mine by him as sole locator was not kept up as required by law to preserve his rights. It is certainly true, however, that if these mines were held in common and this tunnel-work contributing to the development of the three was done by the co-owners with that purpose and was continuous and sufficient in value for the three, the location of the Consolidated mine was void so far as it conflicted with the Andrew Jackson.

The question, then, is, were they held in common at that date, or, rather, does the testimony make out a *prima facie* case in this regard? In the case of Book *vs.* Justice Mining Co., 58 Fed. Rep., 108, it appears that the defendant was the owner of a patented mining

claim, and procured three of its employés to locate, in their own names and at the expense of and for the benefit of the defendant, two mining claims contiguous to their patented mine, one of
44 the claims being located in the name of one employé and the other in the names of two other employés. While these mining claims still remained in the names of the locators the plaintiff located a claim conflicting with one of them, and soon afterwards said employés conveyed to defendant company. Prior to the conflicting location of plaintiff defendant began the construction of a tunnel for the prospecting and developing of the mining claims located by its employés. Title in the mining company was held good. That case seems on all fours with the case at bar, except that the oral agreement here was for the joint benefit of the locators, while in Book *vs.* Justice, *supra*, it was not for the benefit of the locators themselves, but for defendant. *A fortiori* it would seem that the locator could locate for the joint benefit of himself, if he can locate for the benefit of another who is to bear the expense. Also it would appear that if it is a holding in common between one and another for whose benefit and at whose expense the one locates there is much more reason for saying that there is a holding in common between two for whose joint benefit different locations are made.

Yose *vs.* McBrayer, 18 Cal., 582.
Monty *vs.* Lavelle, 18 Pac., 803.
Hubaur *vs.* Reeding, 3 Mont., 13.
Murley *vs.* Ennis, 2 Colo., 703.

It has often been held that an oral agreement for the location of a mine for the benefit of the locator and others is not within the statute of frauds.

See cases last cited.

The question of thus creating merely an equitable title, and therefore not sufficient to maintain a suit in ejectment, cannot, we think, avail here, if it should avail at all, for two reasons. One reason is that so far as the Jackson mine is concerned, if the legal title was not at the time of the location of the Consolidated mine in the two Eberles, it was in the plaintiff as locator, who had preserved
45 his rights by work done for the development of the claims held in common; and, second, the legal title as to both the Lexington and Andrew Jackson mines had been conveyed to plaintiff at the time this action was begun.

Whatever our statute might be construed to mean as to location, we think it certainly true that it cannot produce the result that an oral agreement for such location of mines for the joint benefit of the locator and others does not make a holding in common of all the mines, which if contiguous may be developed by work begun on one of the mines or even off of all of them if intended for and reasonably contributing thereto, as this would be to override an act of Congress. Such statutes must be construed in subordination to the laws of Congress, as they are more as regulations under those

laws than independent legislation. In Murley *vs.* Ennis, *supra*, a Colorado case, it is seen that local statutes have not the effect contended for, the Colorado statutes embracing, as does ours, mining claims under the head of real estate, and real estate being conveyed by deed. So regarding them we attach no significance to the requirement of our statute (Com. Laws, sec. 1566) that the names of the locators must be recorded, as they cannot modify congressional legislation as to a holding in common.

The only remaining question we deem it necessary to notice is as to whether there was a valid location of the Lexington and Andrew Jackson mines. The only attack made on the validity of location, which appears to be strongly pressed on this court, is that the names of three persons claiming an interest in each mine located should have appeared on each location notice. As to this, however, it is replied that in our opinion the legal title was in the locator named for each mine, but the others had such interest with him as constituted, under the mining laws, a holding in common to the extent at least of making work done for development of the three satisfy the law if sufficient in quantity and value. It makes no difference whether the interest of the one other than the locator may be
46 inchoate or equitable, the statute in reference to co-owners does not, we believe, necessarily mean those who are vested with the legal title. In holding this we do not go to the length of the decision in Book *vs.* Justice Mining Co., *supra*, and follow the principle in the cases we have cited.

Our conclusions summarized are as follows:

1. The locations of the Lexington and Andrew Jackson mines are *prima facia* valid, and the parol agreement establishing (locations being made in pursuance thereof) a holding in common was sufficiently proven for a jury to pass upon the same.

2. The work in constructing a tunnel beginning on the Clifton mine was sufficiently shown as to purpose, tendency, continuity, and value to make a *prima facia* case for the jury to consider.

3. There was such a *prima facia* case made under above heads as would authorized a submission to the jury under proper instructions as to whether the location- upon the Lexington and Andrew Jackson mine- were void or not.

For these reasons it is ordered and adjudged that the ruling of the court below in instructing the jury to return a verdict for the defendants as to said mines was error, and that it be set aside; that said verdict be set aside, and that a new trial be granted to plaintiff in error, and that said court be, and is hereby, directed to place this cause on the calender for trial as if it had never been tried.

N. C. COLLIER,
Associate Justice.

We concur:
THOMAS SMITH,
Chief Justice.

I dissent:
N. B. LAUGHLIN,
Associate Justice.

47 And heretofore, to wit, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, on the eighteenth day of December, A. D. 1896, an opinion of the court; which said opinion is in the words and figures as follow*ing* to wit:

48 F. X. EBERLE, Plaintiff in Error,
vs.
WM. CARMICHAEL ET AL., Defendants in Error.

Rehearing on error to district court of Socorro county—A. A. Freeman judge.

The petition for rehearing in this case was allowed for the purpose of reargument upon the proposition that a parol agreement for the acquiring of an interest in a mining claim in New Mexico was within the statute of frauds, and therefore void.

The opinion of this court, reported in 42 Pacific Reporter, at page 95 *et seq.*, proceeded upon the theory that a parol agreement, whereby three persons associated themselves together for the purpose of prospecting, discovery, location, and development of mines for their joint benefit, and located and developed mines in pursuance thereof, constituted a holding in common of such mines under the mining laws of the United States; that the territorial statutes as to how such locations should be made were merely regulatory in their character, and whether such statutes denominated the possessory interest acquired real estate, an interest in real estate, a chose in action, or a chattel, mere denomination of such interest could not raise the statute of frauds as a bar to its acquisition, if it was not there, nor take it away if it was. We held that "Such statutes must be construed in subordination to the laws of Congress, as they are more as regulations than independent legislation," and this would be so without respect to the fact whether such laws were those of a sovereign State or a dependent territory, as in each case they would be local regulations as to an interest or right sought to be acquired or acquired under the mining laws of the General Government.

In the case of Murley *v.* Ennis, which was a Colorado case reported on 2 Colo., 304, it made no difference that in that State a mining claim was declared by law to be real estate. In the case of Gore *v.* McBrayer, 18 Cal., 583, the agreement was verbal, and
49 it was conceded in the opinion, which was delivered by Baldwin and concurred in by Field, C. J., and Cope, J., a unanimous bench, that an interest in a mining claim was real estate by the law of California, but the court held the statute of frauds had no application. It is true that case differs from this so far as the location notice is concerned; there the name of the plaintiff appearing on the notice as one of the locators, while here plaintiff appears as sole locator of the Andrew Jackson mine, and John E. Eberle as sole locator of the Lexington; but the principle which counsel for defendant in error combats is squarely announced, viz., that such an agreement is not within the statute of frauds.

Coming down further, we find in Moritz *vs.* Lavelle, 77 Calif., 10,

exactly such a location notice as here with reference to the Lexington mine. The agreement was verbal and to the effect that plaintiff was to pay all the expenses of defendant in and about the occupying and relocation of a certain mine. The mine was located in the name of the defendant as sole locator in the notice, with plaintiff as a witness, upon the express oral agreement between them that in consideration of the former agreement about paying expenses defendant would transfer by deed to plaintiff an undivided one-half interest in the mine. Plaintiff sued for specific performance, and being met by demurrer that the contract was within the statute of frauds, the demurrer was overruled, Gore *vs.* McBrayer, *supra*, being cited among other authorities. If this case is authority in point so far as the Lexington mine is concerned there can be no doubt as to its being equally pertinent as to the Andrew Jackson, which was located in the name of plaintiff alone.

Again we find a California case, Settembre *vs.* Putnam, 30 Cal., 490, which announces the principle that if two or more persons as mining partners claim and develope a mine situated upon land owned by a third person, and the partners verbally authorized one of their number to purchase the land of the owner for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in the mine in trust for them,
50 Sawyer, J., delivering the opinion of the court.

Why, it may be asked, may not a verbal agreement to acquire a possessory right to a mining claim, and eventually a title thereto from the Government, be effectual to constitute a holding in trust if a title conveyed by an individual to one of the parties constitutes a holding in trust? One title results from the performance of acts required by law, the other by act of parties.

In Traphagen *v.* Burt, 67 N. Y., 30, it was held that a verbal agreement to purchase and improve real estate on joint account, showing equally the profits and losses, was not within the statute of frauds where several farms were purchased thereunder, and the deeds as to all save one were taken in the joint names of the parties, and improvements were made at joint expense upon all, and cattle and other property were purchased for each and all.

The court in discussing that case showed that there was such a part performance as made a resulting trust in favor of the plaintiff.

In the case at bar the evidence shows that in pursuance of the agreement to prospect, locate, and develop the three mines located, one in the name of one of the parties, one in the name of another, and one in the name of the third, expense was incurred by plaintiff as to the three, work was done on the three, and the assessment-work for some of the years was done off of all three, but for the purpose of developing all by means of a tunnel. Why is it not, as declared by Traphagen *v.* Burt, *supra*, a partnership for the acquiring of real estate, and why, under the circumstances, would there not be a resulting trust? It is to be remembered that this objection applies in no way whatever to the status of plaintiff at the time of his bringing suit, for at that time he had, by deeds of conveyance from the other two parties to the verbal agreement attacked here, become vested

with the entire interest in the three mines, but it only applies to the question whether such an agreement and work done and money expended thereunder constituted a holding in common.

51 Surely, if the statute of frauds has no application to the taking up of a mining claim, as decided by the Colorado and California cases, *supra*, nor to a partnership for the acquiring of land and creatings resulting trust where there is part performance, as decided in Settembre *v.* Putnam and Traphagen *v.* Burt, *supra*, at least a holding in common under the mining laws should be held to exist.

It is admitted, as we understand the contention *that* the brief of defendants in error, that the case of Book *v.* Justice M. Co., 58 Fed., 119, is an authority directly and pointedly against their contention, and yet, as we pointed out in the opinion, as to which the rehearing is asked, this case does not go at all to the extent of that. Here is a case where locations are made for the joint interest of all; there was a case where employés of a corporation made the location for the benefit not of themselves, but of the corporation employing them. We quote from the decision (Hawley, judge) on the subject of the statute of frauds: "The statute of frauds relied upon by complainants has no application whatever to the facts in this case. An agreement to locate a mining claim for the benefit of another need not be in writing. If a party in pursuance of such an understanding, at the expense of another, locate the claim in his own name, he holds the legal title to the ground in trust for the benefit of the party for whom the location was made, and such party could, on making the necessary proofs, compel the locator of the mining claim to convey the title thereof to him, although the agreement to do so was not in writing. This familiar principle has often been applied in cases where a party has entered into an oral agreement to locate mining ground for the joint benefit of himself and others, and makes a location in his own name. It has always been held that such oral agreements are not within the statute of frauds. Gore *v.* McBrayer, 18 California, 582; Mority *v.* Lovelle, 77 Cal., 10; Hirbour *v.* Reeding, 3 Mont., 13, and Welland *v.* Huber, 8 Nev., 203."

52 The case at bar is one where, in the language of the learned judge, "this familiar principle has often been applied."

Seeing no error in our former opinion, it will be again ordered that the judgment of the court below be reversed and this cause stand for a new trial.

N. C. COLLIER,
Asso. Justice.

We concur:
THOMAS SMITH, *C. J.*

We dissent:
N. B. LAUGHLIN, *A. J.*
GIDEON D. BANTZ, *A. J.*

53 In the Supreme Court of the Territory of New Mexico.

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a true and correct copy of that portion of the transcript of record filed in the supreme court of the Territory of New Mexico from the district court for the county of Socorro that is deemed necessary by the plaintiffs in error herein to be reviewed in the Supreme Court of the United States, together with a true and correct copy of the assignment of error and all proceedings had in the said supreme court of the Territory of New Mexico, wherein Francis X. Eberle was plaintiff in error and William Carmichael *et al.* were defendants in error, together with the opinions of the judges of said supreme court of the Territory of New Mexico in said cause, which is hereto annexed and transmitted with said record, as the same remains on file and of record in my office.

Witness my hand and the seal of the supreme court of the Territory of New Mexico this 13th day of August, A. D. 1897.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS,
Clerk of the Supreme Court of the Territory of New Mexico.

54 Be it remembered that there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, on January 10th, 1898, a motion; which said motion is in words and figures following, to wit:

FRANCIS X. EBERLE, Pl'ff in Error,
vs. } 606.
WILLIAM CARMICHAEL ET AL., Def'ts in Error.

Now comes the defendant- in error in the above cause and move the court to grant unto them an appeal to the Supreme Court of the United States from the decision of the supreme court of the Territory of New Mexico, and to fix the amount of bond requisite and necessary to cover costs.

WILLIAM B. CHILDERS,
Attorney for Defendants in Error.

55 And be it further remembered that at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the 26th day of July, 1897, and on the thirty-fifth day of said term, the same being Monday, January 10th, 1898, the following, among other, proceedings were had, to wit:

FRANCIS X. EBERLE, Pl'ff in Error,
vs. } 606.
WILLIAM CARMICHAEL ET ALS.

Now, upon reading and filing of motion of defendants in error in above-entitled cause, praying an appeal in said cause to the Supreme

Court of the United States from the judgment and decree of the supreme court of the Territory of New Mexico, it is ordered that an appeal in said cause be, and the same is hereby, granted, as prayed for. It is further ordered that defendants enter into a
56 bond in the sum of two hundred dollars to cover the costs which might be incurred in the taking and prosecution of said appeal, said bond as to form and sufficiency to be approved by one of the justices of this court.

And afterwards, to wit, on the fourteenth day of January, 1898, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a cost bond; which said cost bond is in the words and figures following, to wit:

57 Know all men by these presents that we, William B. Childers, for himself and as attorney for William Carmichael, F. Kilgore, Robert Taylor, George Beardsley, James House, Thomas Coleman, William Flannagan, Thomas Starkweather, Adam Hugg, Martha J. Shelton, George Shelton, T. N. Bertrand, and Charles Davis, as principals, and Geo. P. Money and E. L. Medler, as their sureties, are held and firmly bound unto Francis X. Eberle in the sum of two hundred dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Signed and sealed with our seals this 14th day of January, A. D. 1898.

The condition of the above obligation is such that whereas the above-bounden principals have sued out an appeal to the Supreme Court of the United States from the judgment and decision of the supreme court of the Territory of New Mexico in a cause lately pending in said supreme court of the Territory of New Mexico entitled Francis X. Eberle *vs.* William Carmichael *et al.*, for the purpose of having the said judgment reviewed by the said Supreme Court of the United States:

Now, if the said bounden principals shall prosecute their said appeal with effect and without delay and pay all costs and damages that may be adjudged against them in the Supreme Court of the United States in said cause, then this obligation shall be null and void; otherwise to be and remain in full force and effect.

WILLIAM B. CHILDERS. [SEAL.]
GEO. P. MONEY. [SEAL.]
E. L. MEDLER. [SEAL.]

58 TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

On this 14 day of January, A. D. 1898, before me personally appeared William B. Childers, to me personally known, who signed the foregoing obligation for himself and as attorney for William Carmichael, F. Kilgore, Robert Taylor, George Beardsley, James House, Thomas Coleman, William Flannagan, Thomas Starkweather, Adam Hugg, Martha J. Shelton, George Shelton, T. N.

Bertrand, and Charles Davis, and acknowledged that he signed an executed the same as the free act and deed for himself and the abov named persons.

And also personally appeared before me Geo. P. Money and E. Medler, sureties on said bond, who are personally known to me, an acknowledged that they signed and executed said bond as suc sureties as their free act and deed, and, being duly sworn, said sur ties on their oaths say, each for himself, that he is worth the su of two hundred dollars in property situate in the Territory of Ne Mexico over and above all just debts and liabilities and amoun by law exempt.

GEO. P. MONEY. [SEAL.]
E. L. MEDLER. [SEAL.]

Subscribed and sworn to before me this 14th day of Januar A. D. 1898.

[SEAL.] GEO. L. WYLLYS,
Clerk of Supreme Court, Territory of New Mexico.

The foregoing bond is satisfactory to me and is hereby approve 14 day of January, A. D. 1898.

N. B. LAUGHLIN,
Associate Justice, &c.

59 And afterwards, to wit, on the 14th day of January, 189 there was filed in the office of the clerk of the supreme cou of the Territory of New Mexico a citation; which said citation in the words and figures following, to wit:

60 The President of the United States of America to Francis Eberle, Greeting:

You are hereby cited and admonished to be and appear befo our Supreme Court, at the city of Washington, in the District Columbia, on or before the eleventh day of March, A. D. 1898, the and then to answer the appeal of William Carmichael *et al.*, take from the judgment of the supreme court of New Mexico rendere in your favor in a certain cause lately pending in said last-me tioned court, wherein you were plaintiff in error and William Ca michael *et al.* were defendants in error, and show cause, if any the be, why the said judgment should not be reversed, vacated, and s aside, and speedy justice thereupon done between the parties.

Witness the Hon. Melville W. Fuller, Chief Justice of t
61 Supreme Court of the United States.

THOMAS SMITH,
Chief Justice of the Supreme Court
of the Territory of New Mexico.

On behalf of Francis X. Eberle I hereby acknowledge service above citation this 14th day of January, A. D. 1898.

T. B. CATRON,
Att'y for said Francis X. Eberle.

62 The President of the United States of America to Francis X. Eberle, Greeting:

You are hereby cited and admonished to be and appear before our Supreme Court, at the city of Washington, in the District of Columbia, on or before the eleventh day of March, A. D. 1898, there and then to answer the appeal of William Carmichael *et al.*, taken from the judgment of the supreme court of New Mexico rendered in your favor in a certain cause lately pending in said last-mentioned court wherein you were plaintiff in error and William Carmichael *et al.* were defendants in error, and show cause, if any there be, why the said judgment should not be reversed, vacated, and set aside, and speedy justice thereupon done between the parties.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

THOMAS SMITH,
Chief Justice of the Supreme Court of the Territory of New Mexico.

On behalf of Francis X. Eberle I hereby acknowledge service of above citation this 14 day of January, A. D. 1898.

T. B. CATRON,
Att'y for said Francis X. Eberle.

[Endorsed:] 606. Supreme court, Territory of New Mexico. Francis X. Eberle *vs.* Wm. Carmichael *et al.* Citation. Filed in my office this 14th day of Jan'y 1898. Geo. L. Wyllys, clerk.

63 TERRITORY OF NEW MEXICO:

Supreme Court.

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a true and correct copy of all that portion of the record in the cause lately pending in said court entitled Francis X. Eberle *vs.* William Carmichael *et al.* that the attorneys for the said William Carmichael *et al.* deems necessary for a review of the judgment of said supreme court by the Supreme Court of the United States; and I further certify that all orders therein were taken in open court, as the same appears on file and on record in my office.

Witness my hand and the seal of the supreme court of the Territory of New Mexico this 15th day of January, 1898.

Seal Supreme Court, Territory of New Mexico.

GEO. L. WYLLYS, *Clerk.*

Endorsed on cover: Case No. 17,209. New Mexico Territory supreme court. Term No., 166. William Carmichael, F. Kilgore, Robert Taylor, George Beardsley, James House, Thomas Coleman, William Flanigan, James Starkweather, Adam Hugg, Martha J. Shelton, George Shelton, T. M. Bertrand, & Charles Davis, plaintiffs in error and appellants, *vs.* Francis X. Eberle. Filed December 5, 1898.

5—166

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

WILLIAM CARMICHAEL, ET AL.,
vs.
FRANCIS X. EBERLE.
No. 166.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

This is a suit in ejectment brought in the District Court for the County of Socorro, in the Territory of New Mexico. On the trial of the case, the jury, under instructions of the Court, returned a verdict in favor of the defendants. One of the defendants, Adam Hug, consented to judgment against him for the interest he claimed, one-sixth, in the claims. Judgment was accordingly entered in the District

Court in favor of the other defendants for two mining claims, called the Lexington and Andrew Jackson. (Transcript, folios 21 to 26.) Thereupon Eberle, the plaintiff below, sued out a writ of error to the Supreme Court of the Territory.

On the first hearing in that Court, the Court rendered an opinion and entered judgment reversing the cause, and remanding it for a new trial. One of the three judges who heard the case dissented. (For judgment see transcript, folio 28; for opinion folios 36 to 46 inclusive.) Thereupon defendants in error in that Court filed a petition for a rehearing. The prayer of this petition we insist was granted, and the cause reheard. Upon this rehearing the Court was equally divided. Two of the four judges who participated in the rehearing being for affirmance of the judgment of the District Court, and two for reversal. Nevertheless, the Court rendered a second judgment reversing the District Court and remanding the cause for a new trial. It is this judgment of which we complain.

As there was some doubt as to whether a review could be had by appeal, the case having been originally tried in the District Court by a jury, we have brought it here both by error and appeal.

ASSIGNMENT OF ERRORS.

Come now the appellants and plaintiffs in error in the above entitled cause, and assign for error, committed by the Supreme Court of New Mexico, the following:

First—The Court erred in rendering judgment in favor of the the plaintiff in error in that Court, and reversing the District Court when the Court was equally divided.

Second—The Court erred in overruling the motion of defendants in error in the Court below, to make an entry ***nunc pro tunc***, showing in accordance with the facts, that a rehearing was granted.

Wherefore, appellants and plaintiffs in error pray that said judgment reversing said cause be reversed and in all things held for naught, and that a judgment affirming the judgment of the District Court be entered in said cause.

W. B. CHILDERS,
Attorney for Plaintiffs in Error and Appellants.

AUTHORITIES.

I.

The petition for rehearing was granted and a rehearing had. The motion for a rehearing was filed during the term of the Court, supported by brief in

accordance with the rule of Court. No oral argument could be had unless a rehearing was granted.

Rule XXII of the Supreme Court of N. M. (1894), which was then in force is as follows:

"A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term, and must be printed and briefly and distinctly state the grounds and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a justice who concurred in the judgment desires it and the majority of the Court so determines. Such petition shall be considered by the Court without oral argument, but may be supported by a printed brief."

The docket entry (transcript, folio 33) reads that "this cause coming on for hearing upon the motion of said defendants in error, heretofore filed herein, for a rehearing, the same is argued, &c.," submitted to the Court and taken under advisement. The rule does not permit the argument of the question as to whether a rehearing shall be granted. The argument, if any is permitted, is upon the question raised by the motion for rehearing.

The next entry is the judgment of reversal. This entry recites that the cause has been argued "upon the motion of said defendants in error for a rehearing of said cause *granted herein at a former term*,

the Court being now sufficiently advised in the premises, announces its decision by Associate Justice Collier, Chief Justice Smith concurring, Associate Justices Laughlin and Bantz dissenting, *reversing the judgment of the Court below*, and remanding said cause for a new trial, for reasons stated in the opinion of the Court on file herein." The judgment does not overrule the motion for a rehearing; it hears the cause and reverses it. The Court then enters a second judgment reversing the Court below. (Transcript, folios 33 and 34.)

The second opinion of the Court recites that the petition for rehearing was allowed. It says: "The petition for rehearing in this case was allowed for the purpose of reargument upon the proposition that a parol agreement for the acquiring of an interest in a mining claim in New Mexico was within the Statute of Frauds, and therefore void." (Transcript, folio 48.) Two Judges concur in this opinion, and two dissent. (Folio 52 of transcript.)

It seems perfectly clear, therefore, that there was a rehearing, and that the first judgment of reversal was thereby set aside, and that a judgment of reversal was entered upon an equal division of the Court. It must have been, because the Court deemed that the facts were shown with sufficient clearness that the

motion to enter an order *nunc pro tunc*, showing the granting of the rehearing was overruled.

II.

The granting of a motion for rehearing, and hearing the cause anew, is equivalent to setting aside the first judgment.

Memphis vs. Brown, 94 U. S., 715.

Brockett vs. Brockett, 2 How., 241.

III.

On the rehearing the Court was equally divided as to reversal or affirmance. This affirmed the judgment of the District Court.

"It is settled that when this Court is equally divided upon a writ of error or appeal, the judgment of the Court below stands affirmed."

The Washington Bridge Co. vs. Stewart, 2 How., 413.

So, also, on an equal division in another case, the Court said, "upon this division the judgment of the Court below is necessarily affirmed."

Benton vs. Woolsey, 12 Peters, 27.

See also,

Hemenway vs. Fisher, 20 How., 255.

Bauer vs. T. & P. R. R. Co., 131 U. S., 430.

Strout vs. Foster, 1 How., 80.

Ellis vs. Jones, Id., 197.

Albany Bridge Case, 2 Wall., 403.

Compiled Laws of New Mexico (1897) Sec. 884.

IV.

The Court should have sustained the motion to enter an order granting the prayer of the petition for a rehearing. As already shown, the rehearing was granted and was actually had.

V.

It cannot successfully be contended that the judgment of the Supreme Court was merely an order granting a new trial and therefore not reviewable. It purports on its face to be the reversal of a judgment in favor of the defendant. The writ of error was not sued out to the action of the Court in refusing a new trial, but to review alleged errors of law which took place on the trial. The granting or refusing a new trail is not the subject of review by the Supreme Court of New Mexico. In Coleman vs. Bell, 4 N. M., 28, it is said:

"A motion for a new trial in the Federal Courts is a motion addressed to the discretion of the Court, and the decision of the Court, in granting or refusing it, alone is not the proper subject of a bill of exceptions."

Citing,

Henderson vs. Moore, 5 Cranch, 11.

McLanahan vs. Universal Ins. Co., 1 Peters, 183.

U. S. vs. Buford, 3 Peters, 32.

Bow vs. Gratz, 4 Wheat., 213.

Brown vs. Clark, 4 How., 4.

"The universal rule of practice is that matters resting entirely in discretion are not re-examinable in the Court of errors."

Citing,

Pomeroy vs. Bank of Indiana, 1 Wall., 592.

Rosenthal vs. Chisum, 1 N. M., 633.

Springer vs. U. S., 102 U. S., 586.

Coleman vs. Bell, 4 N. M., 28.

"The granting or refusing a new trial is a matter resting in the sound discretion of the trial judge to whom it is addressed, and it is not reversible unless it shall plainly appear that such discretion has been grossly abused, and that does not here appear."

U. S. vs. Biena, 8 N. M., 105;

Citing,

Territory vs. Romero, 2 N. M., 474.

Archibeque vs. Miera, 1 N. M., 160.

Territory vs. Webb, Id., 160.

Coleman vs. Bell, 4 N. M., 21, and cases there cited.

This has always been and still is the rule in New Mexico. The distinction is clearly pointed out in Sparrow vs. Strong, 4 Wallace, 584. The Court refused to review a case where a writ of error was sued out to the action of the Court in refusing to grant a new trial. The Court held that the only matter brought up for review was the order refusing to grant a new trial, and which was reviewable by the Supreme Court of Nevada, but was not reviewable by this Court. The decision plainly holds that if the judgment of the Supreme Court of the Territory had been on the merits, it would have been the subject of review in this Court.

Sparrow vs. Strong, 4 Wall., 584.

VI.

This Court can enter here a proper judgment affirming the judgment of the District Court. In any event it will remand the case to the Supreme Court of the Territory with instructions to enter a judgment affirming the judgment of the District Court.

Respectfully submitted,

W. B. CHILDERS,

Attorney for Plaintiffs in Error and Appellants.

No. 166.

Brf. of T. B. Catron for Appellee

SUPREME COURT U. S.
FILED
FEB 24 1900
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT

Filed Feb. 24, 1900.

UNITED STATES.

OCTOBER TERM, 1899.

No. 166.

WILLIAM CARMICHAEL, ET AL,

vs.

FRANCIS X. EBERLE.

In Error to and Appeal from the Supreme Court of the Territory of New Mexico.

Brief of Appellee and Defendant in Error.

T. B. CATRON,
Attorney for Eberle.

NEW MEXICAN PRINTING CO., SANTA FE.

In the Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 166.

William Carmichael et al,
vs.
Francis X. Eberle.

WRIT OF ERROR AND APPEAL.

The appellee, Francis X. Eberle, in the above entitled cause, suggests to the court that said cause is appealed to this court solely in respect to the action of the Supreme Court of the Territory of New Mexico without reference to what was done in the district court. That such being the case, it stands here as the trial by the supreme court of the questions on which the appeal is taken. That there is no statement of facts by the supreme court of New Mexico, as required by section 2, chapter 80, of an act approved April 7, 1874, 18 Stat. L., 27. And as said cause is not a proper case for a writ of error, said appellee, Francis X. Eberle, moves the court to dismiss the writ of error because it does not lie in such case and to dismiss the said appeal because there is no statement of facts in accordance with the statute aforesaid.

In case the court should over-rule the foregoing motion, Appellee Francis X. Eberle makes the following

STATEMENT OF FACTS.

Said cause, as commenced in the district court for the county of Socorro, New Mexico, was an action in ejectment. It was tried by a jury in the district court of said county, and was for the possession of three mining claims adjacent to each other, called respect ively: Clifton, Lexington, and Andrew Jackson, situate in the Mogollon mining district, County of Socorro. As appears by the record, the trial of the case occupied about a week. A large amount of evidence was introduced by the plaintiff in the court below (Francis X. Eberle) which is not included in the record. On the conclusion of plaintiff's case, the court directed a verdict in favor of the plaintiff as to the Clifton claim, and that the jury find the defendants not guilty as to the Lexington and Andrew Jackson claims. The defendants in that court, afterwards stipulated that the plaintiff was entitled to one-sixth part of the Andrew Jackson claim, to which stipulation plaintiff was not a party. Judgment was entered in accordance with the verdict and said stipulation. Plaintiff thereupon moved the court for a new trial and in arrest of judgment, both of which motions are in the printed record. The court overruled both the said motions and the case was taken by the plaintiff in the court below to the supreme court of the territory by writ of error, to review the same, and a record containing all of the proceedings and evidence was presented to the supreme court of the territory.

The cause was heard in the supreme court of the territory and a decision in favor of the plaintiff and judgment thereon rendered, (see printed record 16, fo. 28,) reversing the judgment of the lower court and remanding the same to said court with directions for a new trial, and with judgment for costs. The opinion appears in the printed record at page 22 *et seq.*

This opinion finds that all three of the mining claims

had been conveyed to the plaintiff in the court below prior to the time he commenced his suit, and prior to such conveyance, they were held in common by the plaintiff and John E. Eberle and Lankford Johnson, under an oral agreement, and that all annual work and labor had been done on the same in common for the benefit of all said mines or claims during each year. The appellants here and the defendants in the court below, moved the supreme court of the territory for a re-hearing. (See printed record 16, fo. 30.)

Upon filing said motion, the court adjourned until the next term in course and continued all causes not otherwise disposed of. (Page 18, fo. 32.)

Afterwards at the July term, 1896, and on the 11th day of August, 1896 of said term. the following entry in said cause (appears on page 18, folio 33, of said record) was made:

> This cause coming on for hearing, upon the motion of said defendants in error, heretofore filed herein *for a rehearing of said cause*, the same is argued by H. L. Pickett, Esq., attorney for said defendants in error, and by T. B. Catron, Esq., attorney for said plaintiff inerror, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

Afterwards on the 18th day of December, 1896, the court passed upon said motion, denying the same, as appears by the judgment entered pages 18 and 19, folios 33 and 34, which judgment is somewhat peculiar in its terms but it distinctly shows it was a judgment rendered upon the motion asking for a rehearing, and on which motion it appears by the said judgment that the court was divided. The court thereupon in the same judgment, simply reiterated the former judgment entered on the 16th day of October, 1895. (Page 16, folio 28.) Thereupon, the defendants in the court below moved the court to set aside the entry made in said cause on the 11th day of August 1896, (Record

page 18, folio page 33,) and to enter *nunc pro tunc* in place of said entry an order granting to the appellees in said cause, a rehearing, and also that the court set aside the judgment of reversal in said cause on the 18th day of December, 1896; (Record page 16, folio 28,) and enter in lieu thereof, an order affirming the judgment of the court below, claiming that a rehearing had actually been granted and the cause itself re-argued; (Not the motion—the entry on December 18 shows the motion itself was argued and not the cause.) This motion was considered by the court and judgment thereon was entered on March 1st, 1897, in the following words :

> This cause having been submitted on motion to amend the record to make an entry *nunc pro tunc* granting the defendants in error a hearing on a former day of this term, the court announces its decision by Chief Justice Smith, *the associate justices concurring*, denying said motion. It is therefore considered and adjudged by the court that the motion to amend the record and make an entry *nunc pro tunc* be, and the same hereby is, denied.

Whereupon the defendants in error in the Territorial Supreme Court took an appeal to this court and also sued out a writ of error from this court to the supreme court to review said action of the Supreme Court of the Territory in overruling said motion last referred to.

ARGUMENT.

This case seems too plain and simple to require any citation of authorities.

It is submitted that the Supreme Court of New Mexico, having by a majority reversed the judgment of the district court and remanded the cause for a new trial, that was the final determination of the cause, except so far as it was retained to determine whether the court would allow a motion for a rehearing, which

was presented to the court. After the presentation of that motion, the court adjourned until the next term continuing all causes otherwise undisposed of. At the next term an application was made to the court by the defendants in error in the court below to be allowed to argue the motion for a rehearing, orally, which was granted, but this does not appear in the record, but was allowed. The motion was thereupon argued orally by both parties, and when that fact is taken into consideration, it explains what might be considered an apparent peculiarity in the judgment (on pages 18 and 19, folios 33 and 34).

The court will observe that the first part of that entry is as follows:

> This cause having been argued by counsel and submitted to and taken under advisement, by the court on a former day of the present term *upon the motion* of the said defendants in error for rehearing of said cause granted herein at a former term.

This shows plainly that the argument was upon the motion. What is meant then by the words "granted herein" is explained by the fact that an oral argument which was not permitted by the rules of the court upon the motion for a rehearing was granted. There is no record anywhere, showing that a rehearing was granted in the cause except the language above quoted should be so construed absolutely. The judgment which was entered at a former term was absolute and conclusive. The entry in regard to the motion for a rehearing and the only one in the record was made at the same time as the entry last quoted, and that was merely an entry showing that the motion had been argued by the counsel for plaintiff and defendant, and while it does not show that leave was granted to argue orally, it does show quite clearly that there was an oral argument by the counsel which was in contravention of rule 21 of the supreme court

of New Mexico, which rule is in the words following:

> A motion for rehearing after judgment, can be presented, only, at the term at which the judgment is entered unless by special leave granted during the term, and must be filed within ten days after such judgment, if the term shall so long continue.
>
> No motion for rehearing shall be filed unless in the ground or grounds of said motion it shall distinctly point out that some question decisive of the cause and duly submitted by counsel, has been overlooked by the court, or that the decision of the court is in conflict with some controlling decision or provision by statute, to which the attention of the court has not been called, through the oversight or neglect of counsel. Such motion shall be considered by the court without oral argument, but may be supported by printed brief but will not be granted or permitted to be argued unless a justice who concurred in the judgment, desires it, and a majority of the court so determines.

ne as rule 1894.

Which is the rule of the territorial supreme court, as now in force, and is practically and almost identically the same as rule 22 in force in 1894, cited on page 4 of appellant's brief.

This rule, when read in connection with the motion for rehearing and the two entries made thereon in the record pages 18 and 19, folios 33 and 34 shows plainly what is intended by the entry in the record of December 18, 1896. The rule provides that no motion for rehearing shall be granted or permitted to be argued unless a justice who concurred in the judgment desires it and a majority of the court so determines. It is evident that that entry refers to the argument on the motion, and that the argument referred to in the rule was what was granted and that that meant an oral argument. The motion, however, could not have been granted, that is, the rehearing allowed under that rule unless a majority of the court so determined, and the entry of December 18 distinctly shows that there was no majority of the court doing so.

That entry also shows a judgment of the court, in the latter half of it, which seems to be the judgment of that entire court, simply re-affirming the same judgment which had been made at the former term—that is, it reiterates substantially the same judgment.

The appeal in this case is evidently based upon the theory that the Supreme Court of New Mexico did not know what it was doing or what it had done. If there should be any doubt as to that proposition, the same certainly is solved by the judgment of the court made upon the motion to correct the record *nunc pro tunc*. On page 20 of the printed record the court passing upon that motion to have the record corrected *nunc pro tunc*, denies the same in the following words:

> This cause having been submitted on motion to amend the record and make an entry *nunc pro tunc*, granting the defendants in error a rehearing, on a former day of this term, the court announces its decision by Chief Justice Smith, the associate justices concurring, denying said motion. It is therefore considered and adjudged by the court, that the motion to amend the record and to make an entry *nunc pro tunc* be, and the same hereby is, denied.

Here the court's attention was called to everything that it had done, and in the motion, it was claimed that a rehearing had previously been granted. The effect of the judgment of the court on that motion is to say that no rehearing had been granted. And even if it had, that the judgment should stand as it was of record, without any correction. Certainly there is no entry in the record changing the judgment or showing that it ever had been changed, but both entries, the one of the same term and the one of the preceding term are judgments of reversal, and the last entry, asking a correction of the same is the judgment of the entire court—all concurring, that the judgment should not be modified, but in effect that it should stand as it appears on record. That

certainly is the last judgment of the territorial court, and it seems to be conclusive, not only as to what they had done and had intended to do, but as to what they intended should remain as a final result.

The justices of the supreme court of New Mexico possibly might have disagreed upon some one point in the case and still have found enough in the entire record of the territorial supreme court to reverse the judgment of the district court, notwithstanding their disagreement upon one question, even if it should be supposed that a rehearing had actually been granted, and upon the rehearing, an equal division upon some point, because if such should be supposed still that same judgment is the judgment of the whole court reversing the case.

The last judgment of the territorial supreme court denying the motion to correct the record and make entries *nunc pro tunc* is the action of *all* the justices of that court and is the re-affirmation in substance of the judgments previously entered in that court, and shows what the court meant.

It is respectfully submitted that there is nothing in this record which would justify this court in reversing the judgment of the court below.

T. B. CATRON,
Attorney for
F. X. EBERLE,
Appellee and Defendant in Error.

CARMICHAEL *v.* EBERLE.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 166. Submitted March 5, 1900. — Decided March 26, 1900.

In the light of the various orders of the court below, this court holds that a rehearing was not granted in this case, but that the motion for rehearing was permitted to be argued, and as that was heard before four of the judges of the court, and there was an equal division, it was denied; and, as the judgment of reversal was not a final judgment, the appeal must be dismissed.

THE statement of the case is in the opinion of the court.

Mr. William B. Childers for plaintiffs in error and appellants.

Mr. T. B. Catron for defendant in error and appellee.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was an action in ejectment brought in the district court for the county of Socorro, in the Territory of New Mexico, which resulted in judgment against one of the defendants and in favor of the other defendants, whereupon Eberle, plaintiff below, carried the case on writ of error to the Supreme Court of the Territory.

At the July term, 1895, of that court, and on October 16, the following judgment was entered: "This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Collier, Chief Justice Smith concurring, Associate Justice Laughlin dissenting, reversing the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by

the court that the judgment in this cause of the district court in and for the county of Socorro, whence this cause came into this court, be, and the same hereby is, reversed, and that this cause be, and the same hereby is, remanded to said district court, with directions to grant a new trial thereof. It is further considered and adjudged by the court that the said plaintiff in error do have and recover of said defendants in error his costs in this behalf expended, as well in the court below as in this court expended, to be taxed, and that execution issue therefor."

December 17, 1895, defendants in error filed a motion for rehearing, pending which the court adjourned to court in course. At July term, 1896, and on August 11, this order was entered: "This cause coming on for hearing upon the motion of said defendants in error, heretofore filed herein, for a rehearing of said cause, the same is argued by H. L. Pickett, Esq., attorney for said defendants in error, and by T. B. Catron, Esq., attorney for said plaintiff in error, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement."

December 18, 1896, judgment was rendered as follows: "This cause having been argued by counsel and submitted to and taken under advisement by the court on a former day of the present term, upon the motion of the said defendants in error for a rehearing of said cause granted herein at a former term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Collier, Chief Justice Smith concurring, Associate Justices Laughlin and Bantz dissenting, reversing the judgment of the court below, and remanding said cause for a new trial for reasons stated in the opinion of the court on file herein. It is therefore considered and adjudged by the court that the judgment of the district court in this cause in and for the county of Socorro, whence this cause came into this court, be and the same is hereby reversed, and that this cause be and the same is hereby remanded to said district court, with directions to grant a new trial thereof. It is further considered and adjudged that said plaintiff in error do have and recover of said defendants in error his costs in this behalf expended, as well in the court below as in

this court expended, to be taxed, and that execution issue therefor."

On the first day of February, 1897, the following motion was filed: "Now come the defendants in error in the above entitled cause and move the court to set aside the entry heretofore made in said cause on the 11th day of August, 1896, as the same appears upon page 388 of the records of said court in Record B, page 388, and to enter *nunc pro tunc* in place of said entry an order granting to the appellees in said cause a rehearing, and also that the court set aside the judgment of reversal in said cause on the 18th day of December, 1896, as the same appears upon page 464 of Record B of the minutes and records of said court, and enter in lieu thereof an order affirming the judgment of the court below, and for grounds of said motion the said appellees show to the court that a rehearing was granted in said cause, and said cause re-argued and taken under advisement by the court and afterwards decided by a divided court, two of the members sitting in said cause being in favor of reversal and two in favor of affirmation, which entry in legal effect results in the affirmation of the judgment of the court below."

This motion was overruled March 1, 1897, in these terms: "This cause having been submitted on motion to amend the record and make an entry *nunc pro tunc* granting the defendants in error a rehearing on a former day of this term, the court announces its decision by Chief Justice Smith, the associate justices concurring, denying said motion. It is therefore considered and adjudged by the court that the motion to amend the record and to make an entry *nunc pro tunc* be, and the same hereby is, denied." Thereupon the case was brought to this court on writ of error and also on appeal.

The contention of plaintiff in error is that a rehearing was granted, and that, as the court was equally divided on such alleged rehearing, the judgment of the district court was affirmed. We are of opinion, however, that, in the light of the various orders of the Supreme Court, although that of December 18 was somewhat obscurely worded, a rehearing was not granted, but that the motion for rehearing was permitted to be argued, and as that was heard before four of the

judges of the court and there was an equal division, it was denied. Had this been otherwise, the court would not have unanimously overruled the motion to amend the record so as to make it appear that a rehearing had actually been granted.

Moreover counsel agree that under the rules of the court a rehearing could not be granted unless one of the justices who concurred in the judgment so desired, and a majority of the court so determined, and that this was also true of permission to argue such application. It is evident that oral argument was allowed, and it also appears that no justice who concurred in the judgment desired a rehearing, and that a majority of the court did not determine to grant it.

The judgment of reversal therefore stood, and

As it was not a final judgment, the writ of error and the appeal must be dismissed, and it is so ordered.